United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1165

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

THEODORE N. CAMERIERO,
and JOHN FRANK GALANTE,

Appellants.

Docket No. 76-1165

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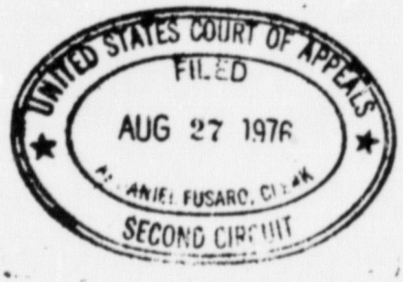
P/S

BRIEF FOR APPELLANT
CAMERIERO

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK



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BRIEF FOR APPELLANT
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ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the affidavit used to obtain the search warrant was insufficient, thus rendering the search and subsequent seizure invalid.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This appeal is from a judgment rendered on April 9, 1976, by the United States District Court for the EAstern District of New York (The Honorable Orrin Judd) convicting appellant of possession of goods stolen from foreign commerce with the knowledge that they were stolen and of conspiracy to commit that crime. Appellant was sentenced to four years imprisonment on each count to run concurrently with each other. The Judge recommended that the sentence run concurrently with a state sentence.

STATEMENT OF FACTS

Appellant, John Galante and Menachem Cohen were indicted for possession, between March 31, 1975, and April 11, 1975, of stolen camera lenses which were part of foreign commerce, knowing the same to have been stolen. They were also charged with conspiracy to commit that crime.[1] The Government's theory of guilt was that Galante and appellant stored the goods in the basement of Cohen's store called the Bristol Bargain Fair.

The motion to suppress

Prior to trial, counsel for Galante made a motion to suppress the lenses (Record on Appeal, Doc. No. 8) asserting

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[1]The indictment is annexed as B to Appellant's Joint Appendix.

the insufficiency of the affidavit in support of the warrant to search the basement of Cohen's store. The affidavit stated:[2]

> (2) A reliable confidental informant, who has previously supplied information to the Federal Bureau of Investigation which information has resulted in the arrest of six individuals in both the Eastern and Southern District of New York for the theft of approximately Two Hundred and Fifty Thousand Dollars ($250,000) worth of stolen merchandise, which arrests have resulted in two convictions, has stated that he was in the above-described premises known as Bristol Bargain Fair Inc., on April 7, 1975. While in the above-described premises the reliable informant observed the Nikkor Camera Lens as well as Precor Radios and APF Scientific Calculators that were stolen from the Greenpoint Terminal WArehouse on March 22, 1975.

Counsel asserted that the affidavit was insufficient under Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). The Government asserted in reply that there was probable cause, and if no probable cause, proper consent by Cohen to search (Record on Appeal, Doc. No. 14).

On November 4, 1975, new retained counsel appeared for appellant and joined in the motion to suppress (Minutes of November 4, 1975 at 7; see also Minutes of November 7, 1975 at 8).

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[2]The warrant and affidavit are annexed as D to appellant's joint appendix.

A hearing on the motion was held on November 7, 1975. Counsel reiterated at the hearing his position that the affidavit did not reveal the basis for informers' assertion that the lenses seen at Bristol Bargain were stolen (H. 15-20).[3] The Court found the affidavit sufficient, but agreed to hear testimony on the issue of whether Cohen consented to the search.

FBI Agent Boling testified that he, with at least four other agents (H. 24-5), entered Cohen's store on April 9, 1975, and told Cohen that he was going to search. After speaking with his attorney, Cohen refused to permit a search of the store (H. 24).[4] Boling advised Cohen's attorney that he would get a search warrant and then he left the store (H. 24). Several agents were left to keep surveillance (H. 36). Boling testified that while in the store he did not see anything that fit the description of the merchandise given by the informer (H. 33).

Boling returned later with the warrant (H. 35-6). He testified that with the warrant, he would have searched the store without Cohen's consent (H. 38). Boling showed Cohen

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[3]References to pages of the transcript of the suppression hearing are designated "H". These pages of the transcript are E to Appellant's Joint Appendix.

[4]Boling said that Cohen seemed inclined to permit the search until he spoke with the lawyer (H.). However, Cohen later testified he had made no decision until he spoke with his attorney (Jan. 29 - 83).

The trial took place on January 28 and January 29, 1976. The transcripts of those dates both contain pages numbered as 61-112. To avoid confusion, the date will be used preceding the page number.

the warrant (H. 38) and commenced the search (H. 39).

Agent Colgan testified that after about twenty minutes of the search (H. 50), Cohen told the agent that he, Cohen, wished to cooperate and make a deal with the FBI (H. 48).[5] Colgan testified he gave Cohen his Miranda warnings. Colgan told Cohen the agents were looking for stolen merchandise at the store (H. 50). According to Colgan, Cohen fully revealed his involvement with the stolen goods (H. 63-4) and his April 4 arrest (see infra at), and said the merchandise was in the store but the agents wouldn't find it. Colgan responded that the agents would conduct a full search (H. 51), that the agents were "a very thorough outfit," that they would find the goods (H. 58). Cohen replied that he did not want his place ripped apart (H. 58) and that he would reveal the location of the merchandise. He did so (H. 51-2) after five to seven agents had unsuccessfully spent an hour looking for the goods (H. 59).

At his own request, no arrest was made of Cohen at that time. Cohen had wanted his arrest delayed until someone came for the goods (H. 70), and this arrangement was made (H. 71).

At the conclusion of the hearing, the Court ruled that the consent to search was valid, and that Bumper v. North Carolina, 391 U.S. 543 (1967), did not require a contrary

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[5]At trial, Cohen said he did not make such a statement (January 29 - 90).

ruling. On January 26, 1976, the arguments on the motion to suppress were repeated (Minutes of Jan. 26, 1976 at 7-8).[6]

On February 2, 1976, during a day-recess in the midst of the trial, the objections to the search and seizure were again raised by both defense counsel. The Court reiterated that it believed the warrant to be valid, and consent to search properly given by Cohen (Minutes of February 2, 1976 at 5).

The trial

It was undisputed that Nippon Kogaku, U.S.A., Inc., imported from Japan, two types of camera lenses (24)[7] which were received on October 18, 1974, at the Greenpoint Terminal Warehouse (25)[8] as bonded goods (30-37). On the night of March 22-3, 1975, the warehouse was broken into (37) and the boxes of camera lenses were removed (38).

Having produced evidence to show the theft, the Government then called Menechem Cohen to testify concerning the participation of appellant and Galante in the illegal pos-

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[6]At that proceeding, appellant had newly assigned counsel.

[7]Numerals are references to pages of the transcript of the trial.

[8]The transcript contains sections which are virtually unintelligible. An example is the prosecutor's inquiry concerning a comparison of the invoice and the receipt on delivery (p. 25, l. 22-25, p. 26, l. 1). See also p. 179, l. 22-25 through p. 180, l. 1-6.

session of the stolen goods. Cohen testified he owned the Bristol Bargain Fair on Pitkin Avenue selling children's wear, cosmetics and drugs (57).

According to Cohen, at the end of March or beginning of April, 1975, a man named Joe telephoned him. Over defense counsel's objection on the ground that it was inadmissible hearsay (59, 61, 66, 67), Cohen testified that Joe asked Cohen to keep a few boxes in the store.[9]

On the same day, or the following day,[10] Joe arrived at Bristol Bargain with Galante. In discussion, Cohen agreed to keep some boxes in exchange for a few dollars (Jan. 28 - 68). A day or two later, Galante and appellant brought the lenses in two loads. Appellant then left the store. A sample was taken from each box for Cohen to sell and make extra money (Jan. 28 - 72). Cohen and Galante put the boxes in the basement (Jan. 28 - 70). Galante covered the door with a wooden panel (Jan. 28 - 71).

After appellant left the store (129), Cohen learned from Galante that the boxes came from the customs warehouse (72) and were thus stolen (129). Cohen said he wanted the boxes removed (Jan. 28 - 72).

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[9]At trial, Cohen was cross-examined by reference to his Grand Jury testimony. In his testimony before the Grand Jury, Cohen made no mention of a "Joe," saying only that, for some unknown reason, Galante, who he had never seen before, came to his store seeking to keep some boxes there (119).

[10]The transcript also says in December (67, l. 20).

Cohen then testified that a man named Moshe Cohen, ("Moshe") not named in the indictment, said he knew to whom to sell the lenses (74).[11] Cohen gave Moshe a sample of the lenses and he took them to Manhattan. Moshe told Cohen someone would call to ask for the number of lenses he wanted. On April 4, Moshe and Cohen took the lenses (75) to "the Village" and were arrested by customs agents (76).[12]

Cohen acknowleged that when he was arrested on April 4, he made a false statement to the Assistant United States Attorney in the Southern District who interviewed him (Jan 28 - 77, 100) in an effort to escape the consequences of his arrest (101).[13] Despite his statement, Cohen was charged with a crime (103). Cohen was released on bail, and when released was re-arrested by New York City Police (Jan. 28 - 104). However, those state charges were subsequently dismissed (Jan. 28 - 105).

Thereafter, Galante telephoned Cohen and Cohen said he wanted the boxes removed from the store (78). Galante stated he would make arrangements (79).

On April 9, 1976, FBI agents entered the Bristol Bargain to search it (Jan. 28 - 79). No search occurred (due

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[11]This testimony was objected to as hearsay, and the objection was overruled (Jan. 28 - 74).

[12]Four other men were also arrested with Moshe and Cohen on April 4 (Jan 29 - 69-70).

[13]Cohen had told the Assistant United States Attorney that a salesman for a company importing calculators had asked if he wanted to do business (100).

to Cohen's objection), and several hours later, the agents returned with a search warrant (Jan. 28 - 80). During the search, Cohen showed the agents where the boxes were (Jan. 28 - 80), but the agents left the boxes in the store.[14]

The next day, April 10, Galante called to say he would see Cohen later. In the afternoon he arrived at Bristol Bargain Fair (Jan 28 - 81)[15] and said he would make arrangements to remove the boxes.

On April 11, Galante called to say someone was coming between 3:00 and 3:30 p.m., to pick up the boxes (Jan. 28 - 83).

Appellant arrived, said that there was a truck down the block, got the truck, and assisted in the loading of the truck (84). Cohen and appellant were then arrested (Jan. 28 - 84).[16]

Cohen testified he pleaded guilty to the indictment and knew he could receive a sentence of up to ten years, but hoped his cooperation would produce a lenient sentence (Jan. 28 - 87).[17] Cohen revealed that he was not going to

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[14]FBI Agent Boling testified to the same events concerning the search and the proceding events (166-171). He also testified that no arrest or seizure was made because the agents wanted to see who picked up the goods (188). It was understood that Cohen did not want to be arrested until that occurred (192).

[15]FBI Agent Armstrong testified he observed Galante enter the store.

[16]See also FBI Agent Boling's testimony at 173-4.

[17]The minutes of the plea proceeding reveal that Cohen pleaded to the conspiracy which carried a five, and not a ten year maximum sentence.

be prosecuted as a result of the Manhattan arrest (Jan 28 - 95), but later he said he pleaded guilty to the April 4 charges (Jan 28 - 70).[18]

After appellant was arrested, he gave a statement to the FBI agents in which he stated that on April 10, while in Cohen's store as a customer, he asked Cohen if he had any work; that Cohen told him to return the next day between 2:00 and 3:00 p.m.; that on the next day, Cohen gave appellant the keys to a truck parked down the block, told him to drive it to the delivery entrance of the store and load it; that he did just that and was arrested (181). Appellant told the agents he did not know the goods were stolen or where they were being taken (202).

FBI Agent Armstrong cooroborated that appellant entered the store, left it to speak to Cohen, and then ran up the street, returning shortly in the truck (258). Armstrong said that appellant arrived at the scene from a direction that was different from the one in which he ran to get the truck (264-5).

Also at the time of his arrest, appellant told the agents his name was Cameriero and that he was born April 2, 1950. He furnished cards with that identification (181)

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[18]The transcript of the plea proceeing shows that the Southern District prosecutor agreed not to prosecute at all if there was a disposition in the Eastern District.

It was stipulated, however, that appellant's correct name was Frank Ramsey[19] and that he was born on November 24, 1943 (281). The real Theordore Cameriero testified that he knew appellant (310), and that on July 7, 1973, appellant had obtained Cameriero's wallet with identification documents (311), and had not returned it.

Camera lenses, identified as those seized from the basement (177), were introduced into evidence. Also introduced into evidence was a box of APF calculators (Exhibit 12) and radios (Exhibit 13) taken from the basement (175-6). Counsel objected to the admission, but the Court denied the instruction, giving only a limiting instruction to the effect that the other items might be relevant to the issue of guilty knowledge.

At the conclusion of the trial, counsel for appellant requested entry of a judgment of acquittal on the ground that the Government had failed to prove appellant knew of the stolen nature of the goods. The Judge denied the motion on the ground that the inference of knowledge from possession was enough to take the case to the jury.

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[19]The transcript incorrectly states that name was Ramsey. The name is in fact Ranzie.

ARGUMENT

THE AFFIDAVIT USED TO OBTAIN THE SEARCH WARRANT WAS INSUFFICIENT. THUS, THE SEARCH OF THE STORE AND LATER SEIZURE OF THE LENSES WAS INVALID AND THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

Both prior to and during the trial defense counsel challenged the sufficiency of the affidavit used to obtain the search warrant for Bristol Bargain Fair. The affidavit stated:

> (2) A reliable confidential informant, who has previously supplied information to the Federal Bureau of Investigation which information has resulted in the arrest of six individuals in both the Eastern and Southern District of New York for the theft of approximately Two Hundred and Fifty Thousand Dollars ($250,000) worth of stolen merchandise, which arrests have resulted in two convictions, has stated that he was in the above-described premises known as Bristol Bargain Fair Inc., on April 7, 1975. While in the above-described premises the reliable informant observed the Nikkor Camera Lens as well as Precor Radios and APF Scientific Calculators that were stolen from the Greenpoint Terminal Warehouse on March 22, 1975.

The defense position was that the affidavit gave no factual basis for the informers conclusion that the camera lenses that he saw on April 7, 1975, were the ones stolen from the Greenpoint Terminal Warehouse.

There can be on quesiton that an affidavit used to obtain a search warrant must set forth "some of the underlying

circumstances" forming the basis of the informant's conclusion that there is illegal activity or evidence thereof on the premises. Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964); United States v. Karathanos, 531 F.2d 26, 29 (2d Cir. 1976). Despite this well known standard, the affidavit of Agent Boling states only that the informant was alleged to have said that he saw on April 7, 1975, the specific lenses that were stolen. The affidavit gives no statement as to how he knew that the lenses were stolen and stolen from the particular warehouse. The mere statement that the informer observed the lenses obviously did not reveal that they were stolen or how the informer knew that. This case is identical to Karathanos, where this Court held that observation of aliens physical characteristics and cramped living quarters would not suffice to conclude that the aliens were in the United States illegally. In Karathanos, the Court rejected the Government's argument that the means by which the informer allegedly got his knowledge could be inferred from the information included in the affidavit. 531 F.2d at 30.

The same reasoning was applied in United States v. Pond, 523 F.2d 210 (2d Cir. 1975), cert. denied, 44 U.S.L.W. 3398 (Jan. 13, 1976). In Pond this Court made clear that the affidavit must reflect whether the senses of the informer gave him personal knowledge. The affidavit in Pond, said

the Court, reflected that the informer smelled marijuana and that, based on the exercise of his olfactory senses, he necessarily had personal knowledge.

Here, knowledge that something is stolen is not simply or necessarily revealed from merely seeing an item. More must be known about what the informer saw or heard to justify the conclusion the goods were the ones that had stolen. Cf. United States v. Karathanos, supra, 531 F.2d at 31.

Further, the description given by the confidential informer of what he observed is not even corroborated by the independent evidence available to the agents. Paragraph one of the affidavit states that an employee of the warehouse reported that a quantity of cartons containing "Nikkor lens" had been stolen. Also given was the name of the shipper, Nippon Kagaku; the name of the receiver, Ehrenreich Photo, Inc.; and the custom bond numbers. The informer did not report that he saw a large number of lenses, nor did he relate any of the other information which might reveal that the lenses were the ones that were the subject of the first paragraph of the affidavit.[20] Indeed, the first paragraph made no mention of the radios and calculators that the informer allegedly referred to.

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[20]Factually, it is impossible to comprehend or infer how the informer arrived at his allegation that the lenses were the ones stolen. The record of the trial clearly shows that the boxes were put in the basement on the day they were delivered, and that some were removed from the basement and store on April 4, but that none were around the store on April 7. Indeed, even the suppression hearing which was limited by Judge Judd to the issue of consent, itself reveals that none were observable, for the agents searched for over an hour and found nothing until Cohen disclosed the location of the cartons.

There being no independent cooroboration of the informer's allegations, or sufficient statement of the factual basis for the assertions, the warrant was improperly granted.

Alternatively to the existence of probable cause, the Government chose to reply on Cohen's consent as justification for the search. It was on this issue that Judge Judd held an evidentiary hearing. The record clearly reveals that Cohen's conduct was prerised on his belief that the agents had a valid search warrant and thus, could legally search his store. The testimony revealed that FBI Agent Boling and at least four other agents entered Cohen's store on April 9, 1975, and announced that they were going to conduct a search. Cohen refused to permit the search on advise of his attorney. Agent Boling then informed Cohen's attorney he would get a warrant to search. Boling returned later and spoke to Cohen. It was only after the agents returned with the warrant that Cohen said the search could go on and that was because the agents had obtained the warrant. Cohen revealed the location of the lenses only after the search was well underway and the agents made clear they would not give up even after an initial failure to find anything. Indeed, Cohen said that he didn't want his store ransacked.

In Bumper v. North Carolina, 391 U.S. 543 (1968), the state argued that a search had been authorized by con-

sent when police were allowed to search a home upon announcing they had a search warrant. The Supreme Court held there was no valid consent:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.
>
> (391 U.S. at 548-9)

It is undisputed that a response to apparently lawful authority is not consent. See Johnson v. United States, 333 U.S. 10, 13 (1948); United States v. Alborado, 495 F.2d 799, 807 n.15 (2d Cir. 1974); United States v. Ruiz-Estrella, 481 F.2d 723, 724-8 (2d Cir. 1973). Here, Cohen clearly refused to consent before the warrant was obtained and the consent was the result of the presence of that authorizing document. Indeed, the agents testified that they would have searched without the approval of Cohen, and that they told Cohen they would continue to search although they met with no initial success. Here, as in Bumper and Alborado, the conduct of the person allegedly giving consent was caused by and a response to the agents asserted authority.

Cohen's alleged offer to cooperate, an offer disputed by Cohen at trial, does not convert what occurred into valid consent. The record shows that the conversation that Cohen

had with Agent Colgan was caused by the on-going search pursuant to the invalid warrant. There is no other explanation for the cooperation. Indeed, even Cohen's arrest five days earlier coupled with the initial demand to search did not produce any offer of cooperation from Cohen. The change resulted when Cohen believed he had no choice but to let the search go on. There was no intervening factor to break the chain of events produced by the warrant. Brown v. Illinois, 422 U.S. 590 (1975); Wong Sun v. United States, 371 U.S. 471 (1963).

At the proceedings below, the Government relied on the "totality of the circumstances test" to argue that Cohen's acquiescence was consent. See Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); United States v. Miley, 513 F.2d 1191, 1201 (2d Cir. 1975); United States v. Faruolo, 506 F.2d 490, 493 (2d Cir. 1974). However, in none of those cases was the Government basing its apparent authority to act on an invalid search warrant. Here, of course, the evidence shows that warrant and the inevitable search which followed were the reason for Cohen's conduct. Nothing in the record contradicts that.

Since there was neither a valid warrant nor valid consent to search, the search and the subsequent seizure of the goods were violative of the Fourth Amendment and the Judge erroneously denied the motion to suppress.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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New York, New York
August 27, 1976

CERTIFICATE OF SERVICE

Aug 27, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Phyllis Skloot Bamberger

CERTIFICATE OF SERVICE

Aug. 30, 1976
Corrected

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.